

2. After considering the gravity of the alleged violation, the size of Respondent's business, and the Respondent's history of compliance under the fuels regulations, the EPA proposed in the Notice a civil penalty of Three Thousand Dollars (\$3,000) (hereinafter "the proposed penalty").

3. The EPA and the Respondent desire to settle this matter according to the mutual covenants and agreements contained herein. The consideration is acknowledged to be adequate, and the EPA and the Respondent agree as set forth herein.

B. Terms of Agreement

1. The EPA and the Respondent agree that the settlement of this matter is in the public interest and that this Agreement is the most appropriate means of resolving the matter.

2. The EPA and the Respondent stipulate and agree to the following facts. It is further agreed that these stipulations are applicable to this Agreement and any proceeding arising out of this Agreement or the subject matter of this Agreement:

a. At all relevant times, the Respondent was a wholesale purchaser-consumer within the meaning of 40 C.F.R. § 80.2 and/or a person within the meaning of section 302(e) of the Clean Air Act 42 U.S.C. § 7602(e).

b. On November 5, 1998, inspectors for the EPA inspected the Harold White Lumber, Inc. facility located at 2920 Flemingsburg Road, Morehead, Kentucky 40351. During the inspection, the inspectors took a sample of diesel fuel from the propulsion tank of one (1) motor vehicle(s) at the Respondent's facility and forwarded the sample to the EPA laboratory for analysis to determine its sulfur content. As a result of that analysis, the EPA determined that the diesel fuel contained in each propulsion

tank had a sulfur content that was in excess of the amount allowed under 40 C.F.R. § 80.29 and section 211(g) of the Clean Air Act.

c. Upon notification of the diesel sulfur violation, Respondent took immediate steps to bring the diesel fuel in the propulsion tanks of its vehicles into compliance with the Clean Air Act (hereinafter "the Act"). In addition, Respondent implemented a policy to prevent future violations from occurring.

d. Jurisdiction to settle this matter exists pursuant to § 211 of the Act, 42 U.S.C. § 7545, 40 C.F.R. Part 80, and other provisions of law.

3. After considering the gravity of the violation, the Respondent's history of compliance with the fuels regulations, the circumstances of this case, the Respondent's ability to continue in business, the terms of this Agreement, and other facts presented by the Respondent, the EPA has determined to conditionally remit and mitigate the proposed civil penalty to One Thousand Eight Hundred Dollars (\$1,800) pending successful completion of the terms of this Agreement. The Respondent agrees to pay One Thousand Eight Hundred Dollars (\$1,800). The due date shall be thirty (30) days from the date the Agreement is signed by the EPA. Late payment of this civil penalty is subject to interest and fees as specified in 31 U.S.C. § 3717. The Respondent agrees to pay the amount due by cashier's check or certified check payable to the "United States of America" and mailed to:

U.S. Environmental Protection Agency
Washington Accounting Operations
P.O. Box 360277M
Pittsburgh, Pennsylvania 15251
ATTN: AED/MSEB - 4978

A copy of the check shall be forwarded simultaneously to Judith E. Graham at the following address:

U.S. Environmental Protection Agency
Western Field Office
12345 West Alameda Parkway, Suite 214
Denver, CO 80228

4. Timely performance is essential to this Agreement. Upon failure to timely perform pursuant to paragraphs B(3) or B(4) of this Agreement, or upon default of or failure to comply with any terms of this Agreement by the Respondent, the entire proposed civil penalty of Three Thousand Dollars (\$3,000) shall be immediately due and owing. The parties agree that upon such default or failure to comply, the EPA may refer this matter to the United States Attorney General for collection pursuant to § 211(d) of the Act, 42 U.S.C. § 7545(d); commence an action to enforce this Agreement or to recover the civil penalty pursuant to § 211 of the Act; or pursue any other remedies available to it. The Respondent specifically agrees that in the event of such default or failure to comply, the EPA may proceed in an action based on the original claim of violation of § 211 of the Act, 42 U.S.C. § 7545, and the Respondent expressly waives its right to assert that such action is barred by 28 U.S.C. § 2462, other statutes of limitation, or other provisions limiting actions as a result of the passage of time.

5. This Agreement becomes effective upon the date signed by the EPA, at which time a copy will be returned to the Respondent.

6. The Respondent hereby represents that the individual or individuals executing this Agreement on behalf of the Respondent are authorized to do so and that such execution is intended and is sufficient to bind the Respondent, its officers, agents, directors, owners, heirs, assigns, and successors.

7. The Respondent waives its rights, if any, to a hearing, trial or any other proceeding on any issue of fact or law relating to matters consented to herein.

8. The terms of this Agreement are contractual and are not mere recitals. If any provision or provisions of this Agreement are held to be invalid, illegal or unenforceable, the remaining provisions shall not in any way be affected or impaired thereby.

9. The validity, enforceability and construction of all matters pertaining to this Agreement shall be determined in accordance with applicable federal law.

10. Upon completion of the terms of this Agreement, this matter shall be deemed terminated and resolved. Nothing herein shall limit the right of the EPA to proceed against the Respondent in the event of default or noncompliance with this Agreement; for violations of § 211 of the Act, 42 U.S.C. § 7545, which are not the subject matter of this Agreement; or for other violations of law.

The following agree to the terms of this Agreement:

HAROLD WHITE LUMBER, INC.

by:  Date: 10-11-99

Harold White Lumber, Inc.

United States
Environmental Protection Agency

by:  Date: 10-27-99
Bruce C. Buckheit, Director
Air Enforcement Division

ACTION MEMORANDUM

SUBJECT: Settlement Agreement for Execution on Behalf of EPA.

FROM: Judith E. Graham, Attorney/Advisor

TO: Bruce C. Buckheit, Director
Air Enforcement Division
Office of Enforcement and Compliance Assurance

RESPONDENT: Harold White Lumber, Inc. Wholesale Purchaser-
Consumer/Fleet

AED/MSEB NO.: 4978 **DATE OF NOV:** 10/4/99

PROPOSED PENALTY: \$3,000

SETTLED PENALTY: \$1,800 **DUE:** 30 days after receipt of SA

CASE SUMMARY: On 11/5/98, EPA contract inspectors conducted a random diesel inspection of this WPC. Inspectors found that one motor vehicle(s) were misfueled with dyed HSD.

DISCUSSION OF SETTLEMENT FACTORS: Respondent corrected all violations and took steps to prevent future violations.

ECONOMIC BENEFIT DISCUSSION: The economic benefit in these diesel misfueling cases was negligible. In some cases the HSD actually had a high cost.

ENVIRONMENTAL JUSTICE: None.

OTHER PARTIES: N/A

Concurrence:

<u>JB</u> 10/19/99	<u>CAF</u> 10/25/99				
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